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Application No.: 10/624,017

Inventor(s): Davenport et al.

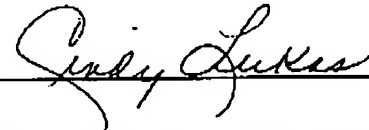
Filed: July 21, 2003

Docket No.: P124C2

Confirmation No.: 5722

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/624,017
Appellant(s) : Gary Mitchell Davenport *et al.*
Filed : July 21, 2003
Title : PROCESS AND COMPOSITION FOR CONTROLLING
FECAL HAIR EXCRETION AND TRICHOBEZOAR
FORMATION
TC/A.U. : 1651
Examiner : Ruth A. Davis
Conf. No. : 5722
Docket No. : P-124C2
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450
Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision mailed April 11, 2006 finally rejecting Claims 23-26, 29-33, 35-36. A Notice of Appeal was timely filed on July 6, 2006.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

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Claims 23-36 are pending in the present application. Claims 1-22 have been cancelled. Claims 23-36 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

No amendment was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention provides for a process for controlling fecal excretion and trichobezoar formation in animals such as cats and rabbits which are prone to hairball formation. (Specification page 1, lines 9-11).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- (I) Rejection Under 35 USC § 102(e) as being anticipated by Sunvold et al. US 6,039,952.
- (II) Rejection Under 35 USC § 102(b) as being anticipated by Reinhart US 5,616,569.
- (III) Rejection Under 35 USC 103(a) over Reinhart US 5,616,569.

ARGUMENTS

Claims 23-26, 30-33 and 36 are patentable in view of Sunvold et al. US 6,039,952, because the reference does not disclose each and every element of the present application; therefore the reference cannot as a matter of law anticipate the present application.

The Examiner states that Sunvold et al. discloses a method for improving clinical signs in an animal with renal disease, the method comprising feeding the animal a composition comprising about 10-32% crude protein, 8-20% fat, 3-25% total dietary fiber, and about 1-11% fermentable fibers. However, the Examiner conceded that Sunvold et al. does not teach that the method is effective for controlling fecal hair excretion and

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trichobezoar formation. Appellants respectfully traverse the Examiner's rejection on the basis of the comments below.

Under § 102, anticipation requires that all the claim elements appear in a single prior art document. "A claim is anticipated only if each and every element set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegel Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is contained in the ... claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

Sunvold et al. teaches a pet food product for improving clinical signs in animals suffering from renal disease. Sunvold et al. does not teach or even suggest the use of the compositions described therein for the control of fecal hair excretion or trichobezoar formation, nor do renal disease and fecal hair excretion / trichobezoar formation appear to bear any relation to each other. Additionally, Sunvold does not teach that the animal is a cat or a rabbit. Therefore, Sunvold et al. does not disclose each and every element of the present application; it cannot as a matter of law anticipate the present application.

Accordingly, Claims 23-26, 30-33 and 36 are novel over the prior art of record. Reconsideration and withdrawal of the rejection on this basis are requested.

Claims 23-26, 29-33 and 35-36 are patentable in view of Reinhart US 5,616,569, because the reference does not disclose each and every element of the present application; therefore the reference cannot as a matter of law anticipate the present application.

The Examiner states that Reinhart teaches a process for treating GI disorders in an animal, the process comprising feeding an animal a composition comprising about 30% crude protein, about 20% fat, about 10% total dietary fiber, and about 3-9% of a supplemental, fermentable fiber. However, the Examiner conceded that Reinhart does not teach that the method is effective for controlling fecal hair excretion and trichobezoar formation. Appellants respectfully traverse the Examiner's rejection on the basis of the comments below.

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Under § 102, anticipation requires that all the claim elements appear in a single prior art document. "A claim is anticipated only if each and every element set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegel Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is contained in the ... claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

Reinhart relates to pet food products containing fermentable fibers for maintaining ameliorating chronic diarrhea in animals, thereby restoring normal gastrointestinal function. See Reinhart, Column 1, lines 34 – 37. Diarrhea is described as an increase in fecal water content with an accompanying increase in the frequency, fluidity or volume of bowel movements. See Reinhart, Column 1, lines 11 – 13. Reinhart does not teach or even suggest the use of the compositions described therein for the control of fecal hair excretion or trichobezoar formation, nor do diarrhea and fecal hair excretion / trichobezoar formation appear to bear any relation to each other. Additionally, Reinhart does not teach that the animal is a rabbit. Therefore, Reinhart does not disclose each and every element of the present application; it cannot as a matter of law anticipate the present application.

Accordingly, Claims 23-26, 29-33 and 35-36 are novel over the prior art of record. Reconsideration and withdrawal of the rejection on this basis are requested.

Claim 32-33 and 35-36 are patentable over Reinhart US 5,616,569 because the references fail to teach or suggest all of the claimed limitation of the present invention and, therefore, do not establish a *prima facie* case of obviousness.

Specifically, the Examiner states that Reinhart teaches a process for treating GI disorders in an animal, the process comprising feeding an animal a composition comprising about 30% crude protein, about 20% fat, about 10% total dietary fiber, and about 3-9% of a supplemental, fermentable fiber. However, the Examiner conceded that Reinhart does not teach that the method is effective for controlling fecal hair excretion and trichobezoar formation. Additionally, the Examiner concedes that Reinhart does not specifically teach that

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the claimed amounts of supplemental fibers are fed to animals. Appellants respectfully traverse the Examiner's rejection on the basis of the comments below.

"The genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion, or reason' to combine cited references." See *McGinley v. Franklin Sports, Inc.*, 262 F. 3d 1339, 60 USPQ2d 1001 (Fed. Cir. 2001). "Determinations of obviousness can not be based on the hindsight combination of components selectively culled from the prior art to fit parameters." See *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998).

Reinhart, while disclosing a pet food product containing fermentable fibers for maintaining ameliorating chronic diarrhea in animals, thereby restoring normal gastrointestinal function, does not teach or suggest a process effective for controlling fecal hair excretion and trichobezoar formation in cats or rabbits.

The Examiner states that the rejected claims are obvious in view of Reinhart because Reinhart suggests a process for treating GI disorders in animals and that by practicing Reinhart, one would be inherently practicing the claimed method of controlling fecal hair excretion and trichobezoar formation. Respectfully, the Examiner's rationale is flawed. Indeed, the Examiner's reference to inherency is misplaced since the rejected claims are directed to a new use for a composition, wherein such new use is directed to a process effective for controlling fecal hair excretion and trichobezoar formation. One of ordinary skill in the art would have failed to recognize the new use in animals, specifically, cats or rabbits based on Reinhart.

In order to establish inherency, extrinsic data must prove that: 1) the inherent property is necessarily present in the reference; and 2) that this would have been recognized by one of ordinary skill in the art. *Continental Can Co. v. Monsanto Co.*, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991). This test, established by the Court of Appeals for the Federal Circuit, is not met in view of Reinhart.

With regard to the first requirement necessary for the Examiner to establish inherency, Reinhart fails to show or even suggest that the alleged inherent property (process

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effective for controlling fecal hair excretion and trichobezoar formation) is necessarily present based on the Reinhart disclosure. For example, Reinhart merely teaches the use of a pet food product for alleviating GI disorders by supplying a fermentable fiber source which provides the GI tract with a preferred energy source to restore natural GI function. Moreover, Reinhart merely reports the fermentability and organic matter disappearance of fibrous substrates by fecal microflora and the occurrence of GI disorders depending on the dietary fibers present. There is absolutely no teaching or suggestion that relates to effectively controlling fecal hair excretion and trichobezoar formation in rabbits or cats. Rather, Reinhart merely reports that inclusion of dietary fiber in specific diets can result to relieve symptoms of chronic diarrhea by "feeding" the cells which line the GI tract of the animal. See Column 1, lines 44-46.

As such, Reinhart fails to meet the first criteria for establishing inherency of Appellants' claims directed to the process effective for controlling fecal hair excretion and trichobezoar formation. The necessary showing, that being a showing of process effective for controlling fecal hair excretion and trichobezoar formation, is not necessarily present in results provided by Reinhart.

With regard to the second requirement necessary for the Examiner to establish inherency, one of ordinary skill in the art would have failed to recognize that certain compositions disclosed by Reinhart could be successfully utilized to effectively control fecal hair excretion and trichobezoar formation. Reinhart merely discloses that that inclusion of dietary fiber in specific diets can result to relieve symptoms of chronic diarrhea by "feeding" the cells which line the GI tract of the animal. See Column 1, lines 44-46. One of ordinary skill could not have known that a composition comprising fermentable fibers could be successfully utilized to effectively control fecal hair excretion and trichobezoar formation in cats or rabbits.

It is particularly important to note that the present invention is directed to animals such as cats and rabbits. Accordingly, it would have been antithetical to equate the use of a pet food product for alleviating GI disorders by supplying a fermentable fiber source which provides the GI tract with a preferred energy source to restore natural GI function (as in

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Reinhart) with the process effective or controlling fecal hair excretion and trichobezoar formation (as set forth in Appellants' claims). For these reasons, the Examiner cannot state that it would have been obvious to arrive at Appellants' invention using Reinhart. Indeed, respectfully, the Examiner appears to be using impermissible hindsight in this regard.

As such, provided with Reinhart, one of ordinary skill in the art would fail to deduce that use of the composition specified in Appellants' claims, would result in the process effective for controlling fecal hair excretion and trichobezoar formation.

In view of the foregoing remarks, Appellants respectfully request that the Examiner withdraw the rejection under 35 U.S.C. § 103(a) because the claims as submitted herein would not have been obvious in view of Reinhart.

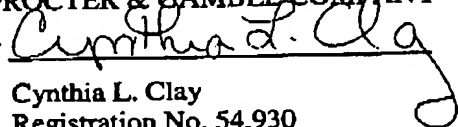
SUMMARY

In view of all of the above, it is respectfully submitted that the aforementioned rejection is erroneous. The Board's reversal of the rejection is respectfully requested.

Respectfully Submitted,

THE PROCTER & GAMBLE COMPANY

By


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CLAIMS APPENDIX

Claim 1-22 (canceled).

Claim 23 (Previously Amended): A process for controlling fecal hair excretion and trichobezoar formation in an animal comprising feeding the animal a composition comprising from about 10% to about 42% crude protein, from about 4% to about 30% fat, from about 1% to about 25% total dietary fiber, all by weight of the composition, and a supplemental fiber source; wherein said animal is a cat or a rabbit.

Claim 24 (Previously presented): The process according to Claim 23 wherein the composition comprises from about 1% to about 13% of supplemental total dietary fiber, by weight of the composition.

Claim 25 (Previously presented): The process according to Claim 23 wherein the supplemental fiber source is selected from the group consisting of at least one fermentable fiber; a blend of at least two fermentable fibers; a blend of at least one fermentable fiber and a cellulose ether; a blend of at least one fermentable fiber, a cellulose ether, and mineral oil; and a blend of at least one fermentable fiber and at least one non-fermentable fiber.

Claim 26 (Previously presented): The process according to Claim 25 wherein the fermentable fiber(s) comprise a fiber selected from the group consisting of beet pulp, gum arabic, fructooligosaccharides, and blends thereof.

Claim 27 (Previously presented): The process according to Claim 23 wherein the supplemental fiber source comprises a blend of beet pulp and carboxymethylcellulose.

Claim 28 (Previously presented): The process according to Claim 23 wherein the supplemental fiber source comprises a blend of beet pulp, carboxymethylcellulose, and mineral oil.

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Claim 29 (Previously presented): The process according to Claim 23 wherein the supplemental fiber source comprises a blend of beet pulp and cellulose.

Claim 30 (Previously presented): The process according to Claim 24 wherein the supplemental fiber source comprises beet pulp.

Claim 31 (Previously presented): The process according to Claim 23 wherein the composition comprises from about 6% to about 12% of supplemental total dietary fiber, by weight of the composition.

Claim 32 (Previously presented): The process according to Claim 23 wherein the composition comprises from about 10% to about 12% of supplemental total dietary fiber, by weight of the composition.

Claim 33 (Previously presented): The process according to Claim 23 wherein the composition comprises about 6% beet pulp, about 2% gum arabic, and about 1.5% fructooligosaccharides, all by weight of the composition.

Claim 34 (Previously presented): The process according to Claim 23 wherein the composition comprises about 6% beet pulp and about 1.5% carboxymethylcellulose, all by weight of the composition.

Claim 35 (Previously presented): The process according to Claim 23 wherein the composition comprises about 6% beet pulp and about 6.5% cellulose, all by weight of the composition.

Claim 36 (Previously presented): The process according to Claim 23 wherein the composition comprises about 12% beet pulp, by weight of the composition.

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EVIDENCE APPENDIX

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RELATED PROCEEDINGS APPENDIX